Supreme Court, U.S.
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No. 10-42

In the

Supreme Court of the United States

DAVID JOE SHELTON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether a federal court is permitted to raise a procedural default issue *sua sponte* in a *habeas corpus* claim.

LIST OF THE PARTIES TO THE PROCEEDING BELOW

The petitioner, David J. Shelton, was initially represented by Elna Gay Leonard by assignment. Elna withdrew as attorney for Mr. Shelton before trial. At trial and sentencing, Mr. Shelton was represented by David D. Walker. On habeas corpus petition, Mr. Shelton was represented by Phillip R. Lingafelt and Noell P. Tin. Mr. Shelton is currently represented by Noell P. Tin of Tin Fulton Walker & Owen, PLLC, 301 East Park Avenue, Charlotte, North Carolina 28203. The United States is represented by Special Assistant United States Attorney Dennis Howard Lee, Western District of Virginia, PO Box 946, Abingdon, VA 24212.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____ Term 2010

DAVID SHELTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, David Shelton, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit rendered in this case on April 2, 2010.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is found at *United States v. Shelton*, No. 09-7696, (4th Cir. April 2, 2010) (unpublished). The opinion is reproduced in Appendix A.

JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's judgment was entered on April 2, 2010. The petition for writ of habeas corpus has been timely filed. Jurisdiction is invoked under 28 U.S.C. § 2255.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The applicable constitutional provision is the Fifth Amendment which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend V.

The statutes involved are:

28 U.S.C. § 2255

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

21 U.S.C. § 848(c)

(c) "Continuing criminal enterprise" defined

For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if—

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter—

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

STATEMENT

On October 5, 2004, Mr. Shelton and a codefendant, Jerry Randall Palmer, were named in a sealed three count second superseding indictment issued by the grand jury. Count One of the indictment charged Mr. Shelton with conspiracy to distribute oxycodone. Count Two charged Mr. Shelton with the possession of oxycodone with intent to distribute same. Count Three charged Mr. Shelton with engaging in a continuing criminal enterprise ("CCE"). Mr. Shelton pleaded not guilty and was tried before a jury from April 19, 2005 through April 21, 2005. The jury returned guilty verdicts on all three counts. On November 4, 2005, this Court sentenced Mr. Shelton to a term of 240 months incarceration on Count two and 360 months incarceration on Count three, with each sentence to run concurrently.

Mr. Shelton gave timely notice of appeal. The United States Court of Appeals for the Fourth Circuit affirmed his conviction and sentence on September 14, 2006. Mr. Shelton then filed a petition for a writ of certiorari in the United States Supreme Court, which denied his petition on February 20, 2007.

On February 19, 2008, Mr. Shelton submitted a motion to vacate his sentence based on four claims for relief. The first was that the indictment was constructively amended. The second was the claim that the jury instructions left out an element of the CCE offense under 21 U.S.C. § 848(c) (formerly 21 U.S.C. § 848(b)). Third was the claim that Mr. Shelton's trial counsel was ineffective for failing to request a buyer-seller instruction. Last was the

claim that the court used an unadjudicated arrest to increase Mr. Shelton's criminal history category.

In its response to Mr. Shelton's Motion to Vacate, Set Aside, or Correct Sentence, the district court addressed only one of the four claims on its merit, the claim for ineffective assistance. Although respondent waived the procedural default defense by failing to raise it, the court brought it up *sua sponte*. The district court gave Mr. Shelton a chance to demonstrate cause and prejudice or actual innocence.

In response to the request of the district court, Mr. Shelton noted that the government had waived the defense of procedural default and a procedural default does not deprive the court of jurisdiction to hear Mr. Shelton's claims. Mr. Shelton also noted that the claim that the jury instruction failed to define the CCE offense is novel and ought to be heard. Last, Mr. Shelton responded that a constructive amendment is a miscarriage of justice.

After reviewing Mr. Shelton's arguments, the district court issued a final order. In this order, the district court raised the procedural default issue *sua sponte* citing the Fourth Circuit decision in *Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999). The court cited its discretion was warranted because (1) Shelton's remaining claims were not raised on appeal, (2) Shelton was given a chance to respond to the procedural default issue, (3) the government's waiver of procedural default was probably inadvertent, and (4) adjudication on the merits would not further judicial economy.

Additionally, the district court argued against the reasons Mr. Shelton gave for the court to hear the claims despite a procedural default. In response to the theory that a court should here structural errors, such as a constructive amendment, the district court said there was no legal authority to support such an idea. In response to Mr. Shelton's claim that the court should hear a novel claim, the district court argued that the novelty doctrine excuses procedural default only when the argument was not reasonably available when it would have been timely made, citing *United States v. Mikalajunas*, 186 F.3d 490, 494 (4th Cir. 1999). In this case the argument was available at the time of trial and when the habeas motion was originally filed. Last, the district court claimed a constructive amendment did not excuse procedural default when Mr. Shelton did not show cause for not bringing up the defense on appeal and did not raise claim of innocence. The court then denied Mr. Shelton's motion.

Following the district court's ruling, Mr. Shelton appealed his *habeas* claim to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit reviewed and upheld the district court's denial of Mr. Shelton's motion to vacate by denying a certificate of appealability.

This petition follows.

REASONS THE WRIT SHOULD ISSUE

In *Trest v. Cain*, 522 U.S. 87 (1997), this Court concluded that a court of appeals is not required to raise a procedural default issue *sua sponte* while reviewing a habeas corpus decision of a district court. *Id.* at 88. The respondent in that case also asked the court to "hold that the law permitted (though it did not require) the Fifth Circuit to raise the procedural default *sua sponte*." *Id.* at 90. The Court left this question open because (1) the language in the Fifth Circuit's opinion suggested the Fifth Circuit believed its precedent required it to raise the procedural default issue, (2) the question presented was clearly limited to whether raising procedural default was *required*, and (3) *Trest* was not an appropriate context in which to answer the broader question of permissibility.

A. Disagreement among the federal courts as to when the court may raise the issue of procedural default *sua sponte* in a federal habeas case has created conflicting standards among the courts.

Our United States Courts of Appeals are split with regard to the justifications and varying standards used to determine *when* it is appropriate for a court to use its discretion in raising the procedural default issue.

The Tenth Circuit has found that discretion is appropriate regardless of whether waiver of the procedural default defense by the government was inadvertent or purposeful. See *Hardiman v. Reynolds*, 971 F.2d 500, 503 (10th Cir. 1992) ("even if the state as a party chooses not to assert its

interests, a court may consider federal interests in comity").

By contrast, other courts have held that discretion is appropriate only where the government inadvertently waived the procedural default defense. See *United States v. Willis*, 273 F.3d 592, 596 (5th Cir. 2001) ("When this Court is considering whether to apply the procedural bar *sua sponte* in the § 2254 context, we consider whether the petitioner has had a reasonable opportunity to argue against application of the bar, and whether the government intentionally waived the procedural bar defense"); *see also Esslinger v. Davis*, 44 F.3d 1515, 1525-26 (11th Cir. 1995) (in deciding not to raise the procedural bar *sua sponte*, the court stated where "the state waives a habeas petitioner's procedural default in failing to obtain appellate review of a claim, the district court should assume that the waiver is justified"). These results clearly are in conflict with one another and would produce different results across the Circuits on the same set of facts.

Still, the contradictions do not end there. The Third Circuit has supported the idea that in order to raise the procedural default issue *sua sponte*, the government must have somehow raised or relied on the defense in a prior proceeding. See *Szuchon v. Lehman*, 273 F.3d 299, 321 n.13 (3d Cir. 2001) (holding that the court could raise the procedural default issue *sua sponte* where the government raised it in its "Objections to the Report and Recommendation") *Compare Smith v. Horn*, 120 F.3d 400, 409 (3d Cir. 1997) (the court is more likely to raise procedural default *sua sponte* when "the state either has raised the issue here only belatedly

or has raised it in the district court but has not pursued that line of attack in the court of appeals").

Similarly, and with stronger language, the Eighth Circuit held in a case well before *Trest* that it would not bring procedural default *sua sponte* in habeas cases. *Eull v. Wyrick*, 675 F.2d 1007, 1009 (8th Cir. 1982) ("where a potential state procedural bar was raised neither by the parties nor by the courts in the state-court proceedings, it should not be raised for the first time to oppose a claim in federal habeas corpus").

These varying standards regarding when a court of appeals may raise the procedural default issue *sua sponte* show a clear disagreement among the federal courts. Such disagreement may lead to two identical defendants getting different results under the same federal law. Such a contradiction begs for resolution of the unanswered question in *Trest* by this Court.

B. Allowing the federal courts to define for themselves when they are permitted to raise procedural default in habeas claims has prevented defendants from having fundamental claims heard on the merits.

The claim of constructive amendment identifies an error the Fourth Circuit has found must be corrected even in the absence of objection. Such an error is considered an error *per se*. *Sustache-Rivera v. United States*, 221 F.3d 8, 17 (2000). The Fifth Amendment to the United States Constitution provides that, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury." U.S. Const. amend V. Accordingly, after an indictment has been returned its charges may not be broadened

through indictment except by the grand jury itself *United States v. Miller*, 471 U.S. 130 (1980). In *United States v. Floresca*, 38 F.3d 706 (4th Cir. 1994) (en banc), the Fourth Circuit stressed the importance of addressing constructive amendment when it stated, "plainly and simply, a court cannot permit a defendant to be tried on charges that are not made in the indictment against him." *Floresca*, 38 F.3d at 711.

Refusing to adjudicate a claim of constructive amendment is contrary to a fundamental principle of the Constitution. In favoring interests of "comity and federalism," the court enforces state interests over the interests of the individual in protecting constitutional rights. It is also likely that in the event of the government's purposeful failure to raise the procedural default defense, the court is actually acting contrary to the government's intentions.

Such refusals prevent the criminal justice system from improving its trial mechanisms. If courts are allowed to add ways to convict a defendant beyond those in the indictment, the justice system fails to protect the defendant from an unlawful conviction. Trial mechanisms are in place to prevent this injustice.

Another effect of procedural default being raised *sua sponte* is that federal courts are given the discretion as to whether or not they would like to hear a novel claim. Procedural default gives the federal court an easy way to refuse to adjudicate a novel claim on its merits. This prevents the law from further development. *Sua sponte* procedural default issues allow courts to pick and choose when they want to address novel claims on their merits.

This has the opposite effect on judicial economy that the courts strive to achieve. By putting off deciding claims on the merits, other cases may go through lengthy appeals in order to decide a point of law that would have been decided earlier had the court been made to hear it.

In Mr. Shelton's case, he was convicted by jury of a continuing criminal enterprise where the jury arguably failed to decide an element of the crime. In a federal criminal case, a jury cannot convict unless it unanimously agrees that the government has proved each element. *See Johnson v. Louisiana*, 406 U.S. 356 (1972). If Mr. Shelton was convicted without the government proving an element of the alleged crime, Mr. Shelton should not be guilty of that crime.

Other serious claims like capital cases[1] also suggest the court should decide if and when courts should be able to permit procedural default issues *sua sponte*. For instance, if a defendant in a capital case is sentenced to death, a judge could decide not to hear the case at his own discretion. When a person's life is at stake and there is a legitimate claim that was not timely presented to the court, the interests of that person's life should trump the interests of comity, federalism, and judicial economy.

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[1] A review of the difficulties involved in procedural default issues as they pertain to a recent capital habeas case, *Miller v. Polk*, 476 F.3d 206 (4th Cir. 2007), can be found at *Federal Courts – Habeas Corpus – Fourth Circuit Fails to Reach a Judgment on the Merits of a Constitutional Claim Based on the State Procedural Default Doctrine*, 120 Harvard Law Review 2246 (2000).

C. This case is the appropriate vehicle for resolving the question presented.

This Court's opinion in *Trest* stated three reasons why the respondent's question as to whether it is permissible to raise procedural default *sua sponte* would not be answered, none of which are present in the case at hand. *Trest*, 522 U.S. at 90-91. First, neither the opinion of the United States District Court for the Western District of Virginia nor the Fourth Circuit have language supporting the contention that Circuit precedent *requires* them to raise the procedural default issue *sua sponte*.

Second, the language of the question presented in this case is not limited to the question presented in *Trest*. In *Trest*, the question presented was specifically limited to whether a court of appeals is *required* to raise the issue. *Id.* at 89. The question presented in the present case specifically addresses whether it is *permissible* for the federal courts to do so.

Third, there were several disagreements between the parties in *Trest* relevant to this Court's decision to not rule on the permissibility issue. *Id.* at 90-91. Unlike *Trest*, the parties involved in the present case do not disagree as to whether the remaining claims have been exhausted. The remaining claims that petitioner seeks relief for are for a constructively amended indictment and a the novel claim that the CCE offense was not properly defined in the jury instructions. Mr. Shelton has not argued that that the claims were exhausted, but, rather, argued that they should create an exception to procedural default.

The parties do not disagree over whether the government "has waived any 'non-exhaustion' defense." *Trest*, 522 U.S. at 91. Both parties agree that the procedural default defense was waived by the government.

Last, there is no disagreement as to whether this is the kind of case where the court might rely on a procedural bar. Mr. Shelton concedes that prevailing Fourth Circuit precedent gives the court discretion to raise the procedural default rule. Mr. Shelton contends that such discretion should be determined impermissible by this Court, or, in the alternative, that discretion was inappropriate given the circumstances of the case. Accordingly, this case is a proper candidate to answer the question of whether a circuit court may raise the procedural default issue *sua sponte*.

CONCLUSION

For the reasons stated herein, this Honorable Court should grant the Petitioner's Petition for Writ of Certiorari.

This the 1st day of July, 2010.

Respectfully submitted,

/s/ Noell P. Tin
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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7696

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

DAVID JOE SHELTON,
Defendant - Appellant.

Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James P. Jones, Chief District Judge. (1:04-cr-00045-jpj-mfu-1; 1:08-cv-80027)

Submitted: March 30, 2010

Entered: April 2, 2010

Before WILKINSON, GREGORY, and SHEDD, Circuit Judges.

Dismissed by unpublished per curiam opinion.

Noell Peter Tin, Appellant Pro Se. Dennis H. Lee, COMMONWEALTH'S ATTORNEY'S OFFICE, Tazewell, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

David Joe Shelton seeks to appeal the district court's order denying his 28 U.S.C.A. § 2255 (West Supp. 2009) motion. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1) (2006). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2006). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that any assessment of the constitutional claims by the district court is debatable or wrong and that any dispositive procedural ruling by the district court is likewise debatable. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683-84 (4th Cir. 2001). We have independently reviewed the record and conclude that Shelton has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

DISMISSED

Entered: April 2, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-7696
(1:04-cr-00045-jpj-mfu-1)
(1:08-cv-80027)

UNITED STATES OF AMERICA
Plaintiff – Appellee

v.

DAVID JOE SHELTON
Defendant – Appellant

JUDGMENT

In accordance with the decision of this Court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Entered: July 9, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA,

v.

DAVID JOE SHELTON,
Defendant

Case No. 1:04CR00045

OPINION

By: James P. Jones
Chief United States District Judge

Dennis H. Lee, Special Assistant United States Attorney, Abingdon, Virginia, for United States; Noell P. Tin, Tin Fulton Walker & Owen, PLLC, Charlotte, North Carolina, for Defendant.

The defendant, a federal inmate, has filed a Motion to Vacate, Set Aside, or Correct Sentence, pursuant to 28 U.S.C.A. § 2255 (West Supp. 2008). I find that the defendant's § 2255 claims are appropriately dismissed as defaulted because he failed to raise them on his earlier direct appeal.

I

The defendant, David Joe Shelton, was convicted by a jury in this court of conspiracy to possess with intent to distribute and to distribute oxycodone

(Count One) and possession with the intent to distribute and distribution of the same drug (Count Two), in violation of 21 U.S.C.A. §§ 841(a)(1) and 846 (West 1999 & Supp 2008); and engaging in a continuing criminal enterprise ("CCE"), in violation of 21 U.S.C.A. § 848 (West 1999) (Count Three). Following the verdict, I sua sponte vacated the conspiracy conviction because it was a lesser included offense of the CCE conviction. *See United States v. Shelton*, 1:04CR00045, 2005 WL 2614939, at *5 (W.D. Va. Oct. 16, 2005).

While the advisory sentencing guidelines provided for life imprisonment, I sentenced Shelton to a total of 360 months imprisonment. *See United States v. Shelton*, 397 F. Supp. 2d 789 (W.D. Va. 2005) (setting forth reasons for sentence). Shelton appealed, but his convictions and sentence were affirmed.[1] *United States v. Shelton*, 200 F. App'x 219 (4th Cir. 2006) (unpublished), *cert. denied*, 127 S. Ct. 1296 (2007).

Shelton then filed this § 2255 motion, raising four claims: (a) the indictment was constructively

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[1] In affirming the judgment on appeal, the 1 Fourth Circuit identified Shelton's appellate issues as follows: (1) the trial court abused its discretion in limiting crossexamination of the government's cooperating witness; (2) the government failed to disclose impeachment material; (3) the trial court abused its discretion in failing to instruct the jury that it could not convict Shelton of either conspiracy or engaging in a continuing criminal enterprise "simply because the evidence established the existence of a buyer-seller relationship"; (4) insufficiency of the evidence to support his CCE conviction; and (5) the trial court erred at sentencing by using the probation officer's calculation of the drug quantity attributable to the defendant. *Shelton*, 200 F. App'x at 222.

amended; (b) the court's jury instructions failed to define the CCE offense; (c) prior counsel was ineffective in failing to request a buyer-seller instruction; and (d) an unadjudicated arrest was used to increase the defendant's Criminal History Category. The government has filed a Motion to Dismiss all Shelton's claims as without merit.

I denied relief as to claim (c), finding that Shelton could not establish the necessary elements of an ineffective assistance claim under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), because the court of appeals had already determined that the absence of a buyer-seller instruction was not abuse of discretion. *United States v. Shelton*, No. 1:04CR00045, 2009 WL 90119, at *3 (W.D. Va. Jan. 14, 2009). I found that the other three claims could have been raised on direct appeal, as they alleged trial court errors and were based on facts and legal precedent available to counsel at the time of trial and appeal. *Id.* at *2. I also found nothing in the record suggesting that the government had intentionally waived the affirmative defense of procedural default or "that the interests of justice do not support my raising it, sua sponte." *Id.*

Because Shelton had not received notice of the procedural default defense, I granted him an opportunity to respond to it. He has filed a response, arguing that the government waived the defense of procedural default and that the court should find exception to the default of two of his three remaining claims. The government has responded, asserting that omission of a procedural default argument from the Motion to Dismiss was not an intentional waiver of the defense and that Shelton has not demonstrated any exception to default.

II

A collateral attack under § 2255 may not substitute for an appeal. Claims regarding trial errors that could have been, but were not raised on direct appeal are barred from review under § 2255, unless the defendant shows cause for the default and actual prejudice resulting from such errors or demonstrates that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack because he is likely actually innocent of criminal conduct. *See United States v. Mikalajunas*, 186 F.3d 490, 492-93 (4th Cir. 1999) (citing *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Procedural default in the habeas context is an affirmative defense. *Yeatts v. Angelone*, 166 F.3d 255, 261 (4th Cir. 1999). Accordingly, by failing to argue in response to the defendant's § 2255 motion that his claims are defaulted, the government waives its interest in asserting the finality of the judgment. *See, e.g., United States v. Metzger*, 3 F.3d 756, 757-58 (4th Cir. 1993) (citing other cases).

However, although the Supreme Court has left the question open,[2] many other courts, including the Fourth Circuit, have held that under some circumstances in the habeas context, the district court may raise the default issue sua sponte, despite the government's failure to present the defense. *See,*

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[2] *See Trest v. Cain*, 522 U.S. 2 87, 90 (1997). Based on *Trest*, Shelton contends that I lack authority to raise the issue of procedural default sua sponte in the habeas context. However, he admits that circuit courts, including the Fourth Circuit, have recognized that a district court holds such authority. *See, e.g., Yeatts v. Angelone*, 166 F.3d 255, 261-62 (4th Cir. 1999) (regarding collateral attack of state conviction, citing many other circuits).

e.g., *Yeatts*, 166 F.3d at 261-62 (regarding collateral attack of state conviction under 28 U.S.C.A. § 2254 (West 2006), citing many other circuits); *Hines v. United States*, 971 F.2d 506, 509 (10th Cir. 1992) (concluding that "the *Frady* defense [in the § 2255 context], like the procedural default and nonexhaustion defenses [in the § 2254 context], substantially implicates nonparty interests sufficiently weighty to permit sua sponte judicial review" of the issue). While the interest of comity between federal and state courts furthered by procedural default in the § 2254 setting is not a concern in the § 2255 setting, sua sponte application of a default defense in a § 2255 furthers the interest in finality in the judgment. *Id.* Moreover, in both types of habeas cases, default "substantially implicate[s] the interests of judicial efficiency, conservation of scarce judicial resources, and orderly and prompt administration of justice." *Id.*

On the other hand, because courts as a general rule should not consider issues that the parties have not presented to them, a district court should exercise its "power to raise a *Frady* defense sua sponte [only] in those situations where the court determines in its discretion that the transcendent interests served by that defense warrant it." *Hines*, 971 F.2d at 509. Factors to consider include whether "the existence of the defense is manifest from the record, the movant has an opportunity to respond to the defense, the record does not reflect any intention by the government to waive the defense, and the interests of judicial efficiency are furthered." *See, e.g.*, *United States v. Willis*, 273 F.3d 592, 596-97 (5th Cir. 2001); *see also Metzger*, 3 F.3d at 758 (finding that where appeal raised only a single

claim, interests of judicial efficiency did not "militate against" addressing § 2255 claim on merits).

I find that exercise of my discretionary authority to raise procedural default sua sponte is warranted under the circumstances in Shelton's case. First, it is clear from the record that the issues raised in Shelton's remaining claims were not raised on appeal. It is equally clear that these claims rely on facts and case law available to counsel at the time of trial and appeal. Second, Shelton has had notice and an opportunity to respond on the issue of procedural default. Third, counsel for the government indicates that he did not intentionally omit the argument that Shelton's § 2255 claims alleging trial court error are procedurally barred because the defendant failed to raise them on direct appeal. Moreover, no evidence in the record suggests that this omission was intentional.

Fourth, resolution of Shelton's three remaining claims on the merits would require considerable expenditure of judicial resources on issues that could have been raised and resolved far more efficiently at the time of trial when the parties and I were familiar with the facts and development of issues in the case. Now, four years later, I would have to conduct time-consuming review of extensive trial records from the three-day jury trial to refamiliarize myself with the relevant facts and legal issues. I would need to research and consider new legal issues. Shelton himself asserts that one of his claims is "novel" and would require deciding an issue of first impression in this circuit. Thus, I find that the interests of judicial efficiency, conserving judicial resources, and orderly disposition of justice will be furthered by invoking procedural default sua sponte in this case.

My finding that Shelton's claims are procedurally defaulted would not have precluded Shelton from obtaining review of the merits of his claims if he had shown cause for the default and resulting prejudice or actual innocence. *Bousley v. United States*, 523 U.S. 614, 622-24 (1998). However, no such showing has been made.

Shelton argues that I should address his first and second claims because they are considered structural errors that should be corrected even if procedurally defaulted.[3] He cites no legal authority in support of this theory that fundamental claims may be considered whenever they are raised, even after the case is final on appeal, and I find none.

Next, Shelton contends he has shown cause for default of his claim alleging inadequate jury instructions on the CCE count because this claim is "novel." He contends that no reasonable basis existed on which to raise the claim earlier because the claim, which is constructed around an open legal question recognized in a dissenting opinion by Justice Kennedy in *Richardson v. United States*, 526 U.S. 813, 830-31 (1999), has not been decided in any case since *Richardson*.

The novelty doctrine applies as cause to excuse default of a habeas claim when "the state of the law [was] such that the legal basis for the claim was not reasonably available when the matter should have been raised." *United States v. Mikalajunas*, 186 F.3d 490, 493 (4th Cir. 1999). Shelton cannot meet this standard here. His CCE claim based on *Richardson* was as available to him at the time of his trial in

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[3] Shelton does not attempt to excuse his procedural default of his fourth claim, regarding the calculation of his sentence

2004- 2005 as it was when he filed his § 2255 motion in 2008. Thus, the novelty doctrine cannot excuse Shelton's failure to raise the claim at trial or on appeal. Because I find that Shelton has not shown cause for his default of the CCE claim, I need not address his prejudice argument.

Because the Fourth Circuit has held that constructive amendments identified on appeal constitute plain error affecting substantial rights, *see United States v. Floresca*, 38 F.3d 706, 713 (4th Cir. 1994), Shelton argues that a miscarriage of justice will occur if I do not address his § 2255 claim that the indictment in this case was constructively amended. Shelton does not show cause, however, for failing to present the constructive amendment claim on appeal. Furthermore, he admits that his § 2255 motion does not present a claim of actual innocence as required to prove a miscarriage of justice sufficient to circumvent a procedural default. *Bousley*, 523 U.S. at 623.

III

For the stated reasons, I conclude that Shelton's remaining § 2255 claims are properly dismissed sua sponte as procedurally defaulted.

A separate Final Order will be entered herewith.

ENTER: July 9, 2009
/s/ JAMES P. JONES
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED STATES OF AMERICA,

v.

DAVID JOE SHELTON,
Defendant

Case No. 1:04CR00045

OPINION

By: James P. Jones
Chief United States District Judge

For the reasons set forth in the Opinion accompanying this Final Order, it is **ORDERED** that the defendant's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C.A. § 2255 (West Supp. 2008) is hereby DENIED.

ENTER: July 9, 2009

/s/ James P. Jones
Chief United States District Judge

28 U.S.C.A. § 2255
Effective: January 7, 2008

United States Code Annotated Currentness
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court

shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme

Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; May 24, 1949, c. 139, s 114, 63 Stat. 105; Apr. 24, 1996, Pub.L. 104-132, Title I, s 105, 110 Stat. 1220; Jan. 7, 2008)